

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

PIONEER HOMES, INC. d/b/a PIONEER  
RETIREMENT COMMUNITY

Employer

and

NELVA J. DUCKWITZ

Petitioner

and

UNITED STEELWORKERS OF  
AMERICA

Union

Case 18-RD-2429

PIONEER HOMES, INC. d/b/a PIONEER  
RETIREMENT COMMUNITY

Employer

and

KAREN J. SCHIMMING

Petitioner

and

UNITED STEELWORKERS OF  
AMERICA

Union

Case 18-RD-2431

**DECISION AND DIRECTION OF ELECTION**

Petitioners seek to decertify the Union as the collective bargaining representative of certain employees of the Employer. The parties agree on the unit description in each

case, as set forth below. The sole issue is whether LPNs Nelva Duckwitz (the Petitioner in Case 18-RD-2429) and Debra Zempel are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, and therefore should be excluded from voting, as contended by the Union. After reviewing the record, it is clear that the Union has failed to establish that either Duckwitz or Zempel are supervisors, and I conclude that both are eligible to vote.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>1</sup>
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>1</sup> The Employer, Pioneer Homes, Inc., doing business as Pioneer Retirement Community, is a Minnesota corporation engaged in the operation of a nursing home located in Fergus Falls, Minnesota. During the past calendar year, a representative period, the Employer derived gross revenue in excess of \$1 million and purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Minnesota.

5. The Employer operates a nursing home consisting of three units. The units are referred to as the south, west and center units. The south and west units each has a capacity of 37 residents and the center unit has a capacity of 36 residents. The nursing care services provided to residents is managed by Director of Nursing Michelle Deckert. About 12 RNs and 20 LPNs report to Deckert, including the Assistant Director of Nursing (an RN), three unit supervisors (all RNs) and the PM house supervisor (an RN). Also in the nursing care services area are certified nursing assistants (CNAs) and trained medication assistants (TMAs). The only difference between CNAs and TMAs is TMAs are allowed to pass medications.

The Employer's employees who provide care to residents work three shifts. The hours of the three shifts are 6:15 a.m. – 2:45 p.m., 2:30 p.m. – 11:00 p.m., and 10:30 p.m. – 7:00 a.m. Ideally, staffing for the 6:15 a.m. – 2:45 p.m. shifts for each unit is an RN unit supervisor, two LPNs or one LPN and one TMA, and four CNAs, except the west unit would have five CNAs. Ideally, the staffing for the 2:30 p.m. – 11:00 p.m. shift is the PM house supervisor to oversee all three units, and (for each unit) two LPNs or one LPN and one TMA or one LPN and one RN, and four CNAs, except the west unit would have five CNAs. For the 10:30 p.m. – 7:00 a.m. shift, ideal staffing is two LPNs or one LPN and one RN, and six CNAs for the entire facility.

One of the units currently represented by the Union and the subject of the petition in Case 18-RD-2429 consists of the LPNs employed by the Employer. LPNs Duckwitz and Zempel were included in the unit, insofar as they were covered by the contract

between the Employer and Union that expired on August 31, 2002. The Employer contends, and there is no evidence to the contrary, that Duckwitz and Zempel are paid the same wages as other LPNs, have the same duties as other LPNs, are covered by the same job description as other LPNs, and are subject to all of the same terms and conditions of employment as other LPNs.

There is no evidence that Duckwitz or Zempel hire, fire, effectively recommend hiring or firing, evaluate, train, suspend, lay off, promote, reward, schedule hours or grant time off for any employees, or that either has been designated a supervisors, attends supervisory meetings, or adjust employee grievances. The Union contends that Duckwitz and Zempel are supervisors for three reasons. First, they have keys. While the Union's witnesses contend that Duckwitz and Zempel have keys to the offices and front door of the facility, Employer witnesses contend that all LPNs (including Duckwitz and Zempel) have keys only to storage areas so that the LPNs can get supplies and to the narcotics box so that the LPNs can get medications for residents. Second, according to the Union, Duckwitz and Zempel can rearrange schedules and move CNAs from one assignment to another if a particular unit is short-staffed. The Employer does not disagree with the Union's second contention, except its evidence is that all LPNs can adjust staffing to resolve staffing shortages, but that they must do so consistent with staffing levels set by the DON. Finally, the Union contends that Duckwitz and Zempel are in charge when RN supervisors are not present and can discipline employees in the absence of RN supervisors. However, one of the Union's two witnesses did not state that only Zempel

or Duckwitz have this authority. Rather, the witness testified “LPNs” act when RN supervisors are not present and “LPNs” can discipline employees in the absence of RNs. In any event, the Union offered no evidence of discipline issued by Duckwitz or Zempel, and neither of the Union’s witnesses explained the bases for their testimony. On the other hand, the Employer contends that LPNs (including Duckwitz and Zempel) never cover for RN supervisors and that only other RNs do so, and that LPNs have no authority to issue discipline.

### **CONCLUSION**

Based on the record, I conclude that the Union has failed to meet its burden of proof that LPNs are supervisors within the meaning of Section 2(11) of the Act. NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). In reaching this conclusion, I note that the Union does not contend, and the record does not establish, that LPNs have the authority to hire, suspend, layoff, recall, promote, discharge, reward or adjust employee grievances. I also note that the Board holds that conclusionary statements by witnesses while testifying, without supporting evidence, are insufficient to establish supervisory authority. Sears Roebuck & Co., 304 NLRB 193 (1991). Yet most of the Union’s evidence is nothing more than conclusionary statements. The Union’s witnesses testified only that Duckwitz or Zempel, or LPNs in general, were “in charge” when RN supervisors were absent and could discipline employees in the absence of RN supervisors. No examples were provided, no documentation offered, and no explanations were offered. While it does appear that Duckwitz and Zempel (along with other LPNs)

can reassign CNAs or TMAs in the event of staff shortages, the Employer contends that they must do so consistent with the DON's plan regarding staffing levels. The Union neither contradicted this evidence nor offered any testimony suggesting that in adjusting assignments due to staff shortage, Duckwitz or Zempel exercise independent judgment. Finally, I conclude that even if I were to conclude that Duckwitz and Zempel have keys to the offices and front door of the Employer's facility (which the Employer denies) that fact by itself does not establish 2(11) status.

6. The following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Case 18-RD-2429:

All full-time and regular part-time LPNs employed by the Employer at its Fergus Falls, Minnesota facility, excluding guards and supervisors as defined by the Act, as amended, and all other employees.

Case 18-RD-2431:

All full-time and regular part-time non-professional employees, including CNA's, van drivers and housekeeping, dietary, laundry, activity and maintenance department employees employed by the Employer at its Fergus Falls, Minnesota facility, excluding RNs, LPNs, office clericals, managers, certified occupational therapy assistant, physical therapy assistant, health information services employee, guards and supervisors as defined in the Act.

## **DIRECTION OF ELECTION**<sup>2</sup>

An election by secret ballot will be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the Notices of Election to be issued subsequently, subject to the Board's Rules and Regulations.

Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>3</sup>

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<sup>2</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulation, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **October 17, 2002**.

<sup>3</sup> To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list for each unit containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by United Steelworkers of America.

Signed at Minneapolis, Minnesota, this 3<sup>rd</sup> day of October, 2002.

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Ronald M. Sharp, Regional Director  
Eighteenth Region  
National Labor Relations Board  
Suite 790, Towle Building  
330 Second Avenue South  
Minneapolis, MN 55401

Index #177-8560-0100  
177-8560-6000  
177-8580-8050

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date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, these lists must be received in the Minneapolis Regional Office, Suite 790 Towle Building, 330 Second Avenue South, Minneapolis, MN 55401-2221 on or before **October 10, 2002**. No extension of time to file these lists may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such lists. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.